(3)

No. 06-1591

IN THE

Supreme Court of the United States

PERRY S. REICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO OPPOSITION

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REPLY TO STATEMENT OF THE CASE

The Solicitor General makes several factual assertions that are refuted by the record and omits several relevant ones. Because neither he nor his staff reviewed the trial transcript, it is understandable and inadvertent. Nonetheless, because these facts are relevant to the issues raised in the Petition and show that, if the issues are resolved in Petitioner's favor the outcome would be impacted, they are set forth below:

1. Neither the District Court nor the Court of Appeals "found" that Petitioner intended to defraud anyone. The statement at p. 12, n.2, of the Memorandum In Opposition ("mem. op.") is incorrect and misleading. The quotation from the District Court opinion is out out-of-context (see Pet. App. 41a.). The District Court stated that, for the purposes of the Obstruction of Justice Count, 18 U.S.C. § 1512(c)(2), the jury could have found an intent to deceive the Second Circuit by making Davidson his unwitting agent. The District Court's "Theory" was not adopted, much less discussed, by the Court of Appeals for the simple reason that the government never invoked that "Theory" before the jury. More important, the District Court eschewed that "Theory" at sentence, specifically stating, "I don't know why Mr. Reich did what he did. I don't know that he knows why he did what he did. This is a tragic case . . ." A. 1624.

2. At the proffer session, Petitioner's attorney was told that, if Petitioner admitted that the incident was a "joke", some sort of non-prosecution agreement might be reached. A. 777-78. Judge Mann's law clerk

(Judge Mann did *not* testify) testified and admitted that he originally told investigators that "it appears that someone was playing a joke." A. 563.

3. The Petition for Mandamus was *never* withdrawn, according to the Second Circuit Docket Sheet, available on Pacer, under *in re Ryan, Beck & Co.*, it was *denied* on the merits.

4. The F.B.I. believed that the bogus document was created on one of Petitioner's computers, either at his home or office, and the hard drives at both locations were cloned, pursuant to a warrant. A. 625-626. No such evidence was found, and some trace of it would have been found had this theory been correct. A. 731-32, 996-999, 1172-74.

5. The Government failed to produce an original fax or a true and complete copy of it. The copies did not differ as to substance. But, that was not at issue. The differences occurred in the "header" area. Some of the "copies" had "extended page 2.1" in the area, one had "extended page 2.2," and several had no such notation at all. The "extended page 2.2" surfaced for the first time a few weeks before trial. A. 629-632. No one testified that he or she made a copy from the original, only that "someone" had made them. A. 156, 168, 211, 285. The differences were central to the defense as the defense expert was of the opinion that the document could not be traced back to a fax. A. 1024-1025.

6. A report by the F.B.I. laboratory corroborated the absence of any nexus between the purported fax and any equipment maintained by Petitioner at his home.

A. 1231-32. The Government did not call this witness, because, as the District Court noted, it undermined the Government's case. A. 1231-32.

7. A search warrant obtained for Petitioner's home and place of business authorized the seizure of a fax machine. There was no dispute that it was not possible to send the subject fax from Petitioner's home computer using its fax modem because the Government's expert explained that the extended page function would only be triggered by a large page size, here two or three pages held together, and Petitioner had a flat-bed scanner. A. 1002. Although a booklet for an ancient machine was found, no fax machine was listed on the return to the search warrant. Yet, the investigating agent testified that he "found" a fax machine in Petitioner's basement, but forgot to take it. A. 621, 625.

8. Petitioner did raise issues of lack of a transcript on recording. A. 664 (Government objection to line of inquiry sustained), and requested a hearing on the good faith basis for cross-examination of the character witness, which was denied. A. 834. Counsel made the confrontation argument namely that there was no way in which the out of court accusation could be challenged through cross-examination. A. 830, 831, 832. And, in permitting the inquiry, the Court said that the question went to the "heart of the Government's case." A. 841.

REPLY TO ARGUMENT

A. *Intent To Defraud Is An Element Of 18 U.S.C. § 505:*

As it must, the Government concedes that there is a conflict between the Circuits, but argues that the minority position is correct, because, at the time that the Federal Criminal Code was re-codified in 1948 four provisions involving forgery contained the words "intent to defraud", while Section 505 did not. It then argues that the failure to use the terms in Section 505 must be construed as a deliberate omission, irrespective of the dictionary definition of the term "forgery".

In doing so, it relies upon *Bates v. United States*, 522 U.S. 23 (1997) and *United States v. Wells*, 519 U.S. 482 (1997). But both cases involved the difference in statutory provisions that were enacted at the *same* time. *Bates*, 522 U.S. at 29; *Wells*, 519 U.S. at 492. No case holds that this rule of construction may be applied to statutory provisions enacted at *different* times. To the contrary, where a stature is simply re-codified or re-enacted, Congress is "presumed to be aware of [a] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pous*, 434 U.S. 575, 580 (1978).

Section 505 was originally enacted as a part of the Bankruptcy Act of 1867. *See United States v. Cowan*, 116 F.3d 1360, 1363 (10th Cir. 1997). At that time, there can be no question that forgery was understood to require an intent to defraud. *See Moskal v. United States*, 498 U.S. 103, 121-28 (1999) (Scalia, J., dissenting). *See Gilbert v. United States*, 370 U.S. 650 Cir. 1962). And even today, as

we have noted, the common definition encompasses an intent to defraud.

The Government argues harmless error for the first time in this Court. *See*, Brief and Appendix for the United States in the United States Court of Appeals for the Second Circuit, pp. 33-38. It should not be considered here, for there was good reason for the Government's failure to argue it below. The evidence at trial presented a close case. Indeed, two Government witnesses were forced to concede that initial review suggested a "joke". A. 563, 777-78. And, of course, the District Court confessed at sentence that it "d[id]n't know why Mr. Reich did what he did." A. 1624. There was a serious question on the issue of intent to defraud.

As indicated above, the District Court, did not find that there was no issue with respect to an intent to defraud under 18 U.S.C. § 505. The quotation at p. 12, n. 12, is out of context and with respect to that count; the "Theory" was never argued to the jury and was not mentioned by the Court of Appeals.

Given the contested evidence on intent, recited above, *Neder v. United States*, 527 U.S. 1 (1999), cited by the Government with a "cf." can have no relevance. *Neder* was, moreover, decided by a divided court, and is difficult to square with *Apprendi v. New Jersey*, 530 U.S. 455 (2000) and its progeny.

B. *Cross-Examination Of Character Witness:*

The Government response demonstrates the need for an authoritative construction of F.R. Evid 405.

The traditional justification for allowing "specific act" cross-examination of a character witness is not to prove that the Defendant committed a particular bad act, but rather is permitted to enable the prosecutor to "test the knowledge and credibility of the witness" *Gross v. United States*, 394 F. 2d 216, 220 (8th Cir. 1968). Thus, F.R. Evid. 405 limits the subject of inquiry to "relevant specific instances" of conduct. *See* 2 Weinstein's Federal Evidence § 405.03 (2d ed.); 22 Wright & Graham, Federal Practice and Procedure, § 5268, at 620 (1978).

An act cannot be relevant for cross-examination of a "reputation" witness, unless it is of a type "likely to have become a matter of general knowledge, currency or reputation in the community". *United States v. Duke*, 492 F. 2d 693, 696 (5th Cir. 1974). For an "opinion" witness, the ". . . relevant cross-examination is only that which bears on the fact or factual basis for the formulation of that opinion". *United States v. Curtis*, 644 F. 2d 263, 268 (3rd Cir. 1981). Thus, it must be a matter that the witness would have reason to know about. *See, United States v. Scholl*, 166 F. 3d 964, 974 (9th Cir. 1999) (Cross-examination about public charges of judicial incompetence proper); *United States v. Bruguie*, 161 F. 3d 1145, 1149 (8th Cir. 1998) (Child abuse adjudication is "early verified"; relevant because if the witness knows about it, the basis of her opinion that Defendant was a good father would be undermined, and if she did not know about it, the jury could find that her acquaintance with the Defendant was not thorough enough to justify that opinion).

How can the government seriously contend that the claimed breach of contract—the agreement required written notice, oral notice was given—is "plainly relevant to Petitioner's honesty and integrity?" Mem. Op., pg. 13. It cannot be offered for its truth, despite the Government's implication otherwise. It is only relevant if there were reason for an Appellate Court Clerk to know about it. How could he? The document is not one that he would have access to. And how does giving oral notice instead of written notice—after the matter was discussed with the partner's family members? How is this an act that reflects on character?

Contrary to the Government's argument, there was *no* evidence that this purported breach of contract was known in the community or should otherwise have been known by the witness. After all, the District Court explicitly *denied* a hearing on the issue. A. 834.

Also, though the Government claims to the contrary, the record shows that Defense Counsel repeatedly protested that there was no method to challenge the out of court innuendo, precisely the argument that is made in support of lack of confrontation. A. 830, 831, 832.

No claim is made of harmless error, nor could there be as the District Court said. The inquiry went "to the heart of the Government's case". A. 841. The entire episode was outrageous. The Government was permitted to paint Petitioner as an abhorrent individual who steals money from widows and orphans.

This is reminiscent of asking a witness "When did Defendant stop beating his wife?" It should not be condoned by this Court.

C. *Need For Clear Proof Of What Was Said To Sustain Conviction Under 18 U.S.C. § 1001:*

The Government does not dispute that there is a split in the Circuits concerning the need to show a specific question and a specific answer in order to sustain a conviction under 18 U.S.C. § 1001. Instead, it claims that the issue was not raised below. The Government is incorrect.

Petitioner made specific Motions to Dismiss the count, because the indictment charges that he affirmatively stated that he did not fax the Order, but the only testimony at trial was that Petitioner never *volunteered* that he did so. A. 770, 778. Moreover, inquiry into whether a recording or transcript was made, or should have been made, was precluded by the Trial Court on the Government's objection. A. 664.

Respectfully submitted,

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